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Docket No. 97-1718

IN THE SUPREME COURT OF UNITED STATES

October Term, 1998

MARILYN MOSS, Petitioner,

vs.

PEGGY GARRITY, PEGGY GARRITY, a corporation, DOUGLAS BENEDON, GERALD SERLIN and BENEDON & SERLIN, a partnership, Respondents.

[California Supreme Court Case No. S066408]

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

NEMECEK & COLE
JONATHAN B. COLE, Bar No. 70460
(counsel of record)
KAREN K. COFFIN, Bar No. 149866
15260 Ventura Boulevard, Suite 920
Sherman Oaks, California 91403-5399
(818)788-9500

Attorneys for Respondents
PEGGY GARRITY, an individual and
PEGGY GARRITY, a Professional Corporation

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35 pp

Lorraine Mitchell Legal Briefs

732 E. WASHINGTON BOULEVARD
LOS ANGELES, CALIFORNIA 90021-3088
(213) 747-5831 • FAX (213) 747-5843

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I.

SUMMARY OF THE ARGUMENT

A. 28 USC §1257 Does Not Confer Jurisdiction On This Court To Decide The State Law Questions Raised, Which Relate Exclusively To Whether Legal Malpractice Was Committed, And The Application Of State Statutes Of Limitations To Malpractice Claims

A Petition for a Writ of Certiorari presented to the United States Supreme Court must, first and foremost, identify questions which are both within this high Court's jurisdiction and appropriate for review [Rules of US Supreme Court, Rule 14(1)(a), (e)]. Petitioner, MARILYN MOSS ("MOSS") has done neither, probably because her always convoluted theory becomes even more unintelligible when she tries to frame it as a federal question, suitable for review by the United States Supreme Court.

This action is a run of the mill, legal malpractice action filed by MOSS against PEGGY GARRITY, an individual and PEGGY GARRITY, a professional corporation (collectively "GARRITY"), among others [Petition, Ex. 3, p. 10]. GARRITY is accused of negligently failing to assert certain defenses, on MOSS' behalf, when MOSS was sued for fees by her prior attorneys Burton & Norris and Gronemeier & Barker ("Prior Attorneys") [Id. at pp. 4-11]. The Prior Attorneys, who had represented MOSS in connection with a sexual harassment lawsuit in federal court against her former

employer, Santa Fe Railway ("Santa Fe Action"), sued MOSS in state court ("Attorney Fee Claim"), after GARRITY obtained a $3 million stipulated judgment for MOSS in the Santa Fe Action [Id. at pp. 2-7].

In addition to legal malpractice, MOSS also asserted against GARRITY, claims for breach of fiduciary duty and breach of contract [Id. at pp. 11-13]. The Los Angeles Superior Court sustained GARRITY's demurrer, without leave to amend to all causes of action asserted against her both on the merits and because MOSS' claims were barred by the Statute of Limitations [Id. at pp. 13-14].

MOSS appealed the Superior Court's decision, arguing only that the trial court's reliance on the case of Joos v. Intermountain Health Care, Inc. (10th Cir. 1994) 25 F.3d 915, was misplaced [Id. at p. 15]. Accordingly, MOSS failed to preserve any other argument for appeal (Marketing West, Inc. v. Sanyo Fisher (USA) Corp (1992) 6 Cal.App.4th 603, 607, fn. 1, 7 Cal.Rptr.2d 859; In re Marriage of Ananeh-Firepung (1990) 219 Cal.App.3d 272, 278, 268 Cal.Rptr. 83). The California Court of Appeal disagreed with MOSS' analysis of the Joos case and affirmed the lower court's ruling [Petition, Ex. 3, p. 29].

The Court of Appeal then turned to the question of whether MOSS should have been granted leave to amend her Complaint to allege that GARRITY charged exorbitant fees, and used a retainer agreement which did not comport with California Business and Professions Code requirements, and was liable for malpractice and breach of

fiduciary duty for those reasons [Id. at p. 24]. The Court of Appeal answered this questions in the negative based on California's statute of limitations [Id.]

Based on the Court of Appeal's decision,[1] it is hard to imagine how a "federal question" could arise out of the fact pattern here at issue. Try as MOSS might to challenge the validity of a statute on constitutional grounds, the fact of the matter is that the "final judgment" from which she appeals is the California Supreme Court's refusal to review the mundane questions of whether GARRITY committed malpractice and whether MOSS' claims and potential claims were barred by the statute of limitations. Thus, the United States Supreme Court does not even have jurisdiction to grant certiorari pursuant to 28 USC §1257, which provides:

> **"Final Judgments or decrees rendered by the highest court of a state in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn into question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege, or immunity is specially set up or**

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[1] The California Supreme Court denied review of this matter without comment.

> **claimed under the Constitution or the treaties, or statutes of, or any commission held or authority exercised under, the United States."**

B. MOSS Has Presented No Questions Appropriate For Supreme Court Review

Rule 10 of the Rules of the U.S. Supreme Court provides that a petition for a writ of certiorari shall be granted only for "compelling reasons" such as where there are conflicting rulings on an "important federal question." Although MOSS articulates some rather "important" federal doctrines, such as Equal Protection and Due Process, the inescapable fact is that her Petition does not really raise any of those questions -- particularly in light of the record which reveals that her appeal from the trial court's decision was really quite narrow, and raised none of the sweeping constitutional questions she now tries (unsuccessfully) to weave into her arguments.

MOSS identifies four "Questions Presented" for Review, which are:

1. Whether or not the 45% attorney contingency fee contract violates the Equal Protection Clause and/or the Supremacy Clause of the United States Constitution;

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2. Whether or not an Unconstitutional attorney contingency fee contract is voidable;

3. Whether or not litigation of Federal Court Attorney fees in State Court is Unconstitutional and barred by res judicata and collateral estoppel; and

4. Whether California Court's misapplication of Statute of Limitations law violates the Procedural Due Process Clause of the United States Constitution resulting in a miscarriage of justice and reversible error.

As explained, herein, none of these constitutes an "important federal question," nor were any of the rulings challenged by MOSS, improperly made by either the trial court of the California Court of Appeal. To the contrary, the State Courts' rulings are amply supported on independent and adequate state law grounds.

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II.

THERE ARE NO COMPELLING QUESTIONS RAISED BY THE PETITION

A. MOSS Cannot Articulate Any Violation Of The Equal Protection Clause Or The Supremacy Clause

1. The Equal Protection Doctrine Is Not Implicated

MOSS' first argument is a request that this Court, under the guise of "equal protection",[2] engage in judicial activism to unilaterally legislate a cap on legal fees for prosecution of a sexual harassment action, and then retroactively apply that limit to a fee collected by GARRITY **six years ago**.[3] The basis for this novel proposal is California Business and Professions Code Section 6146(a), which limits attorneys fees in medical

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[2] Certainly, the California Constitution expressly prohibits the denial of equal protection o flaws; however, this is not a case of unequal protection, as was the case in Gay Law Students Assn. v. Pacific Tel. & Tel. Co. (1979) 24 Cal.3d 458, 468, 156 Cal.Rptr. 14, cited by MOSS (apparently without ever reading the case). The Gay Law Students Assn. case found that the defendant violated a state law that prohibited governmental public utilities from arbitrarily discriminating in employment against any class of individuals (Id. at 467). GARRITY has not done anything akin to this type of discrimination by charging a 45% contingency fee, which is the basis for MOSS' so-called "equal protection" claim.

[3] In its decision (Exhibit 3 to Petition, p. 3-4) the Court of Appeal found that the underlying Federal Action was settled on June 22, 1992, and within thirty days GARRITY asserted her contingency claim for fees (see also, Petition, p.3).

malpractice cases. MOSS' theory is apparently that Business and Professions Code Section 6146(a), which places a cap on attorneys fees in certain types of cases, violates "equal protection" standards because it only applies to medical malpractice cases, but not other types of cases, such as the Santa Fe Action, which was based on sexual harassment. Since the challenged statute (i.e. §6146) was **not** applied to MOSS, and does not apply to her, however, she cannot have been injured by it.[4] Further, by no stretch of the imagination did GARRITY, the defendant here at issue, participate in any kind of "state action," in collecting her contractually agreed upon fee, as is required for an equal protection challenge (See e.g., National Collegiate Athletic Assn. v. Tarkanian (1988) 488 U.S. 179, 109 S.Ct. 454). Finally, the constitutionality of Section 6146 has already been upheld in cases such as Roa v. Lodi Medical Group, Inc. (1985) 37 Cal.3d. 920, 211 Cal.Rptr. 77, wherein an equal protection challenge to the statute was rejected because of the "rational relationship" between the limitation of attorneys fees in medical malpractice cases, and a number of legitimate objectives such as reducing malpractice insurance costs, and encouraging realistic settlements in an area of litigation which has a unusually high percentage of defense verdicts at trial (Roa at 931-932, 211 Cal.Rptr. at 84).

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[4] If, as MOSS suggests, the statute should be repealed (see Petition, p. 10), then that action would in no way affect GARRITY's contractual right to her attorneys fee from MOSS. Further, no action for money damages would lie in any event (Bonner v. Santa Ana (1996) 45 Cal.App.4th 1465, 53 Cal.Rptr.2d 671).

2. <u>It Is Inconceivable That A 45% Contingency Fee Could Violate the Supremacy Clause</u>

Although MOSS' statement of questions for review suggests that she will argue that the 45% contingency fee agreed to by MOSS and GARRITY violates the Supremacy Clause, she does not, in fact, make that argument. Moreover, it is inconceivable how enforcement of a contract, which is challenged only for allegedly not complying with state law (see discussion under heading II. B., below) could run afoul of the Supremacy Clause. Accordingly, to the extent MOSS contends that a 45% contingency fee violates the Supremacy Clause, it is impossible to address that argument because MOSS has not explained the basis of that argument.[5]

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[5] See discussion regarding preemption by the Federal Arbitration Act, supra at heading II.C.4., infra.

B. The Question Of Whether The MOSS-GARRITY Retainer Agreement Was Voidable Under State Law Does Not Support A Petition For Certiorari, Particularly Since The Court Of Appeals Has Ruled That This Type Of Claim Would Be Barred By The California Statute Of Limitations In Any Event

Despite MOSS' misleading factual allegations[6] and misapplication of the law, her claim that her retainer agreement with GARRITY ("MOSS-GARRITY Retainer") is voidable is neither meritorious, nor an appropriate subject for review, notwithstanding MOSS' attempt to characterize the agreement as "Unconstitutional." The fact of the matter is that MOSS' only complaints in this regard are based on California Rules of Professional Conduct, and California statutes. Specifically, in MOSS' opening brief to the Court of Appeal, she asserted (for the first time), claims that GARRITY collected exorbitant fees, the MOSS-GARRITY retainer agreement was "unethical,

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[6] GARRITY submits that the Court of Appeal's "Statement of Facts" (found at pages 2-14 of Exhibit 3 to the Petition) is much more reliable than the one prepared by MOSS which contains inaccurate and misleading information. For example, MOSS neglects to mention that the $3 million judgment obtained by GARRITY in the Santa Fe Action was a stipulated judgment entered into as part of a settlement (which explains why there were no applications for prevailing party attorneys fees). Similarly, MOSS does not disclose that , in order to induce GARRITY to take her case, MOSS represented that there were no other attorney liens, and both MOSS and GARRITY vehemently dispute the claimed 40% lien of MOSS' Prior Attorneys. This is a far cry from the "full knowledge of a 40% lien already on " the Santa Fe Action, as alleged at page 3 of MOSS' Petition. As a result of this and other mischaracterizations, GARRITY rejects MOSS' statement of facts, and adopts (for purposes of this brief) the Court of Appeal's Statement of Facts.

unlawful and unconstitutional" and the agreement failed to comply with California Business and Professions Code section 6147. [See Petition, Ex. 3, p. 24]. There is absolutely no federal question, nor any other issue within the scope of Title 28, Section 1257 of the United States Code raised by these arguments.

Moreover, in addressing MOSS' claims, the Court of Appeal found that "[t]hese theories were not alleged against Garrity in the Complaint and were not tested by the Demurrer." [Petition, Ex. 3 p. 24]. The Court of Appeal then found that, even if the claims had been asserted, they would not have stood because "they are barred by the statute of limitations." [See Petition, Ex. 3 p.24]. This alone is a clearly stated adequate and independent state ground for the judgment on these claims, and as such bars review by this Court. (See Michigan v. Long (1983) 463 U.S. 1032, 103 S.Ct. 3469).

Specifically, the applicable statute of limitations, California Code of Civil Procedure section 340.6[7], establishes a one year limitation for an action against an attorney for a wrongful act or omission, that begins to run once the plaintiff, through use of reasonable diligence, should have discovered the facts constituting the wrongful acts or omissions.[8] The facts are clear that on June 25,

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[7] The code section is set forth in full in Section D 2 below.

[8] To side-step the applicable statute of limitations for this claim, MOSS contends that this claim is for a breach of contract and thus the applicable statute of limitations is four years. [Petition p.12]. However, any action, other than fraud, against an attorney falls under California Code of Civil

1992, GARRITY was paid her fee and the costs incurred out of the settlement proceeds [Petition, Ex. 3, pp. 3-4]. GARRITY then substituted out of the case, due to a conflict of interest, on October 30, 1992 [Id. at p. 5]. This is the latest point at which the statute would have begun to run, because MOSS had paid GARRITY and certainly aware of the fee at that time. For MOSS to later claim that the fee was too much and the MOSS-GARRITY Retainer is voidable is insufficient to overcome the statute of limitations.[9]

C. The State Court Action Against GARRITY By The Prior Attorneys For Fees Was Procedurally Proper

The only federal issues which are at all involved in this case are those which arise as a result of MOSS' misplaced reliance on the Employment Retirement Income Security Act ("ERISA") and the Federal Arbitration Act ("FAA"). MOSS argues, in effect, that GARRITY negligently failed to properly analyze and utilize these statutes in order to defeat the Prior Attorneys' Fees Claim. This theory does not change the essential character of this dispute, however, which indisputably is one for legal malpractice and other purely state law claims.

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Procedure §340.6. (See Stoll v. Sup. Ct., infra).

[9] See also, discussion at heading III.D., infra.

Moreover, MOSS' argument that GARRITY should have relied (but negligently did not rely) on federal statutes is meritless in any event and the trial court's ruling (affirmed on appeal), that MOSS could not state claims for malpractice, breach of fiduciary duty or breach of contract against GARRITY based thereon, was correct. MOSS's entire case was based on the misguided and disjointed theory that the Prior Attorneys who represented MOSS before GARRITY in the Santa Fe Action should not have been permitted to sue MOSS by way of the Attorney Fee Claim, and GARRITY committed malpractice and breached contractual and fiduciary duties by not asserting a convoluted, and clearly meritless defense.

1. The Joos Case Is Not In Conflict With Any Other Federal Court Decision And Consequently Is Not Preempted, And Does Not Provide Grounds For Review By This Court

a. Federal Law Authorizing Recovery Of Attorneys Fees From An Opponent Under Certain Circumstances Does Not Preempt State Law Contractual Claims By An Attorney Against A Client For Fees

MOSS contends that GARRITY should have argued that the exclusive means by which the Prior Attorneys could collect attorneys fees from MOSS was by way of a motion to amend the federal judgment in the Santa Fe Action pursuant to Rule 59(e) of the Federal Rules of Civil Procedure, or pursuant to the cost-collection

procedures set forth in Local Rule 16.10 of the United States District Court, Central District [Id.]. Apparently, MOSS' position is that, because the Santa Fe Action was in federal court because of ERISA issues contained therein, the Supremacy Clause of the United States Constitution mandates that these federal procedures for a prevailing party to collect fees from an opposing party displace, preclude and preempt the customary state law contract action by an attorney against his client for payment of fees.

This is ludicrous, however, as one has nothing to do with the other -- there is no reason for the procedures for collecting prevailing parties attorneys fees under federal law to have any affect on fee agreements between attorneys and clients. As such, it is obvious that Congress did not, as MOSS claims, intend to "occupy the field concerning the award of attorneys fees in a federal question case," [Petition, p. 16], such that attorneys lose all contractual rights against their clients when they are retained in connection with a civil rights case, or other federal case in which a prevailing party may obtain statutory attorneys fees. Moreover, in a case such as the Santa Fe Action, where as part of a stipulated judgment the parties execute mutual releases [See Petition, Ex. 1, p. 3], the procedures from collecting fees from an opposing party are completely irrelevant in any event because any claims to such fees have been waived.

Finally, it has specifically been held in the case of Joos, supra, that, even where it is appropriate to recover fees from an opponent pursuant to a statute such as

ERISA, an attorney is not required to limit his fees to those recovered it that fashion, nor do "prevailing party" attorneys fees procedures affect an attorney's right to institute a state law contract claim to recover fees not obtained as a prevailing party. Thus, it is clearly not true that federal mechanisms for recovering fees from an opposing party preempt state law contract rights to recover fees, and the preemption question is neither "federal" nor "important" in any event.

b. Joos Is On Point With This Case And Specifically Defeats MOSS' Arguments

In Joos, the court specifically addressed and answered, **in the negative**, the question of whether a contingent attorney fee breach of contract action was preempted by the federal ERISA[10] statute, and whether the attorney fees provision of ERISA was intended to place a cap on the amount that the plaintiff's attorney could collect for his efforts in prevailing on the underlying action. (Joos at 917-18). In other words, notwithstanding statutory provisions for an opposing party to pay attorneys fees, an attorney still has state law contractual claims for payment against his client (Joos, supra, Vanegas v. Mitchell (1990) 495 U.S. 82, 110 S.Ct. 1679; Joseph E. DiLoreto, Inc. v. O'Neill (1991) 1 Cal.App.4th 149, 159-161, 1 Cal.Rptr.2d 636). In MOSS's case, the Prior Attorneys filed such claims, and the fact that GARRITY could not stop them was not malpractice, nor was it a

[10] The Santa Fe Action was similarly before the federal court because of ERISA issues contained therein [See Exhibit 3, p. 3 to Petition].

breach of any duty -- particularly since the Santa Fe Action was resolved by way of a stipulated judgment whereby each party voluntarily agreed to assume their own attorneys fees and costs [Petition, Exhibit 1]. This conclusion is specifically support by Joos.

i. Joos Is Persuasive Authority Properly Followed By The California Courts

Despite MOSS' contentions, it is well settled that a presiding court can consider the decision of another court as **persuasive authority**. (See e.g., Flater v. Secretary of Health & Human Services (1995) 44 F.3d 1453, 1458; see also, e.g., Torres-Lopez v. May (1997) 111 F.3d 633, 643). Thus, the mere fact that GARRITY cites to the Tenth Circuit Joos case, in support of her legal arguments should not in any way preclude the California courts from seriously considering the persuasive authority contained therein, as acknowledged by the Court of Appeal in its Opinion where it noted:

> **"While appellant's point about the precedential value of federal cases in application of California law is correct, it is insufficient for two reasons. First, the legal theories discussed in Joos, and upon which the court based its ruling, are solid and comport with California law. Secondly, appellant's argument relates to application of federal law;**

> **that only the federal court had jurisdiction to handle the claims of cross-complainants. Thus Joos is directly applicable and defeats appellant's argument."** [Petition, Ex. 3, pp. 18-19].

ii. Joos Is Not Distinguished In Any Meaningful Respect

MOSS also attempts to distinguish Joos from this case. This endeavor, too is destined to be unsuccessful. In Joos, the plaintiff-appellant, Carla Joos, assisted by her attorney/co-plaintiff, had previously instituted an ERISA action against her health care provider, Metropolitan Life Insurance Co., for payment of substantial medical expenses incurred by Joos at the defendant-respondent Intermountain Health Care's ("IHC") hospital, McKay Dee Hospital, wherein Joos' newborn, infant son had received intensive medical treatment for his serious medical complications. (Id. at 916).

Prior to the initiation of the ERISA action, Joos had entered into an express written attorney fee agreement with her attorney, which required her to pay him one-third of any amount ultimately paid by Metropolitan in the underlying ERISA action. Additionally, the attorney allegedly entered into a similar contingency fee agreement with IHC for the recovery of the same medical expenses allegedly owed by Metropolitan. Thus, the attorney, thereby, had insured himself of attorney fee recovery

should he ultimately prevail--which he did--in the action against Metropolitan. (Id.)

Metropolitan ultimately settled the action against it by agreeing to pay IHC $503,000.00 in full settlement of Carla Joos' debt.[11] The district court ordered Metropolitan to also pay $13,250.00 to Joos' attorney, as attorney for the prevailing party in the ERISA action, under the attorney's fees provision in ERISA, 29 U.S.C. § 1132. After the lawsuit, Joos' attorney attempted to collect from IHC the difference between his court award in the ERISA action and the amount he would have been paid under his alleged one-third contingency fee agreement with IHC. IHC refused to pay, and Joos promptly filed suit against IHC and Metropolitan in Utah state court, alleging various state law claims including, among other things, breach of the contingency fee contract by IHC. IHC removed the case to federal court, where the district court held that the breach of contract action and other state claims were preempted, and thus invalidated, by ERISA. An appeal to the Tenth Circuit then followed. (Id.)

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[11] Thus, it is obvious that MOSS' suggestion, that Carla Joos received her entire $503,000.00 personal injury judgment is in error. [See Petition at p. 8]. In fact, Joos received none of that money, as it all went to IHC to pay Joos' debt.

The Tenth Circuit prefaced its opinion with a statement of the question addressed therein:

> **"The issue in this case can rather be simply stated: whether [the] plaintiff's state lawsuit involving state causes of action is voided by ERISA's preemption provision."** (Id. at 917 (emphasis added)).

The Tenth Circuit also addressed the issue of whether or not "attorneys who represent plaintiffs in ERISA cases must accept as their total fee the amount that the court awards the attorney under the ERISA attorney fees' provision if the client prevails." (Id. (emphasis added)).

As to the first issue, the Court of Appeals expressly held: "ERISA does not preempt Plaintiff's state law claim and Defendants have not alleged a sufficient basis for federal jurisdiction to support their removal to the federal district court." (Id. at 918 (emphasis added)). As to the second, and equally as important issue addressed, the Court concluded:

> **"[I]t is clear that the attorney fees' provision of [ERISA] was not intended to place a cap on the amount that a plaintiff's attorney may collect for his efforts. The award of attorney's fees in an ERISA action is simply intended to offset some or all of the plaintiff's**

> **costs because of the behavior of the defendant, and it in no way affects the contractual relationship between a plaintiff and his attorney.**" (Id. (emphasis added)).

Thus, the sound reasoning of the Joos case squarely defeats MOSS' arguments that GARRITY should have asserted the defense that the state court attorney fee claim was unconstitutional [Petition p. 15], and that the Federal Courts had inherent jurisdiction to decide the attorney fee claims [Petition p. 16].

2. The Joos case does not conflict with the Palomas case and the facts of this case

MOSS continues to assert that the Ninth Circuit case of Palomas Land & Cattle v. Baldwin, (9th Cir. 1951) 189 F.2d 936, supports her meritless assertion that the Joos case should not have been followed by the state trial court herein. In Palomas, the plaintiff trust beneficiaries sued the sole surviving trustee of an express trust which benefitted the plaintiffs. The plaintiffs contended that, being a trustee, the defendant was not entitled to file an interpleader action pursuant to 28 U.S.C. Section 1335 against them and was not entitled to attorneys' fees under such action. The Ninth Circuit disagreed, holding that "[i]n Federal courts, the allowance or disallowance of costs, including attorneys' fees, is governed by Federal law, not by State law." (Palomas at 938). In other words, the Palomas holding merely states that in determining whether or not attorneys' fees should be awarded under a

federal statute, such a determination is to be governed by federal law.

Palomas is irrelevant to GARRITY's arguments and the case at bar. As stated above, the Fee Claim asserted by the Prior Attorneys is a simple breach of contract claim, a **state** cause of action over which the Federal Court would have **no** basis for jurisdiction. The contingency fee agreement between the Prior Attorneys and MOSS just happened to arise out of a previously litigated ERISA case, but that fact has **no** impact, whatsoever, on the legal aspects of the Prior Attorneys' valid claims against MOSS, nor on the **state law** governing aspects of the Fee Claim.

In summary, Palomas does **not** hold, nor even imply, that the Prior Attorneys' **State law based** Contingency Fee Claims in the case at bar must, therefore, be determined solely in federal court or solely under federal law. The relevance of the Joos case and the Palomas case has been explained to MOSS now at the trial court level, and in briefs filed with California Court of Appeal, and the California Supreme Court, yet MOSS still refuses to heed the clear meaning of those cases.

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3. The Supremacy Clause And The Federal Arbitration Act Do Not Lend Any Support To MOSS' Claim Regarding Any Unconstitutional Arbitration Of The Fee Disputes

MOSS' argument that the FAA preempts the state law under which the Attorney Fee Claim was decided and implicates the Supremacy Clause [see Petition, pp. 15-18], is as erroneous as her other analyses because the FAA in no way invalidates agreements to arbitrate. Similarly, nothing in 28 U.S.C. §652(a)(B) impacts the arbitrability of the Attorneys Fee Claim.

MOSS' reliance on the Supremacy Clause and its extension through the Federal Arbitration Act ("FAA") is misguided and non-supportive of her contentions. The Supremacy Clause acts to preempt state law when state law conflicts with federal law. Here, the California state courts enforced the arbitration provision in the retainer agreement between MOSS and her Prior Attorneys. This is in total compliance with the FAA, section 2, which not only favors arbitration, but requires enforcement of arbitration provisions in contracts involving commerce.

Additionally, the FAA only acts to preempt state law when state law requires a judicial forum over arbitration. (Volt Info. Sciences v. Leland Stanford Jr. Univ. Bd. of Trustees[12] (1989) 489 U.S. 468, 475, 109 S.Ct. 1248,

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[12] This Court in Volt Info. Sciences, supra at 468, 109 S.Ct. at 1248, found that California rules governing the conduct of arbitration "are manifestly designed to encourage resort to the arbitral process" and do not

1254, 103 L.Ed.2d 488; Southland Corp. v. Keating (1984) 465 U.S. 1, 10, 104 S.Ct. 852, 858; See also Doctor's Ass., Inc. v. Casarotto (1996) __ U.S. __, 116 S.Ct. 1652, 134 L.Ed.2d 902). Furthermore, The FAA creates "a substantive rule applicable in state as well as federal courts", which gives the federal and state courts concurrent jurisdiction under the FAA. (Southland Corp. at 15-16). Consequently, even if a claim for arbitration was brought under the FAA, it could be heard in state court.

Thus, the Prior Attorneys were on solid ground when they petitioned for arbitration of the Attorney Fee Claim. They had an unambiguous written agreement to submit fee disputes arising out of the Retainer Agreement to binding arbitration. The arbitration provision was enforced in accordance with California Code of Civil Procedure Section 1281 and Business & Professions Code Section 6204, and the FAA. Under these circumstances, it cannot be said that GARRITY's failure to contend that arbitration was improper in the federal question case was in error.

Finally, nothing in 28 U.S.C. §652(a)(B) changes this conclusion. That statute merely limits the authority of a U.S. District Court to refer a matter to arbitration when the money damages sought exceed $100,000.00. Either in an attempt to mislead the Court or another example of MOSS' misunderstanding of the clear letter of the law,

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conflict with "any . . . policy in the FAA." The Court further found that "the California arbitration rules . . . generally foster the federal policy favoring arbitration." (Id. at 476, fn. 5, 109 S.Ct. at 1254, fn. 5).

MOSS has thus cited a statute that has no relevance to the facts of the case at bar. Section 652(a)(B) of Title 28 simply does not act to preempt state law or limit the amount of money that can be involved in a state case arbitration, it acts to limit the monetary value of the cases that the district courts can refer to arbitration. Moreover, MOSS' contention that 28 U.S.C. §652(a)(B) limits arbitration is directly contrary to the federal policy favoring arbitration and enforcing arbitration awards. (See Volt Info., supra).

D. The U.S. Supreme Court Cannot Properly Take Review Of This Case Based Upon Misapplication of the Applicable Statute Of Limitations

Rules of the U.S. Supreme Court, Rule 10 states that a petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated law. Furthermore, the California Court of Appeals sustained the demurrer based upon state procedural grounds and the state statute of limitations which provides an Adequate and Independent state ground for the decision thus barring review by this Court.

1. The Trial Court's Decision Was Based Upon Adequate And Independent Legal Grounds, Which Bars A Review By This Court

Despite MOSS' allegations that the complaint was dismissed based solely on the Joos case [Petition pp. 4, 5, 23], the decision of the trial court was **"based on the**

Joos case and the reasons in the moving party's papers." [Petition, Exhibit 3, p.14 (emphasis added)]. Further, the court of appeal noted MOSS' misleading reference [Exhibit 3, p.16] and that the grounds relied upon by Respondent Garrity in her demurrer were the applicable statutes of limitation [Petition, Exhibit 3, p. 13].

MOSS' claims asserted in her Petition, against Respondents for legal malpractice, breach of fiduciary duty and breach of contract, were never addressed in her Petitioner's Brief to the Court of Appeal, and thus were untimely raised on appeal. The court of appeal held that "[f]ailure of appellant to address [the] grounds raised in the demurrers serves as an independent basis upon which to affirm the judgment of the trial court". [Petition, Exhibit 3 p. 17]. The court of appeal further held that MOSS' three claims could not stand "because they are barred by the statute of limitations. . ." [Petition, Exhibit 3, p. 24-25].

In Michigan v. Long, supra, this Court stated that "[i]f the state court case decision indicates clearly and expressly that it is alternatively based on bona fide separate, adequate and independent grounds, we, of course, will not undertake to review the decision." Thus because the court of appeal clearly determined the issue based upon state procedural law, and alternatively determined that MOSS failed to bring her claims within the applicable state statute of limitations, this court cannot take review of the issue. (See Id.).

2. MOSS' Claims Against Respondents Are Unequivocally Barred By The Statute Of Limitations

Since all claims that MOSS is asserting against GARRITY have arisen out of the attorney-client relationship, and fall short of fraud, the applicable statute of limitations on all the causes of action is the same. (Stoll v. Sup. Ct. (1992) 9 Cal.App.4th 1362, 1366, 12 Cal.Rptr.2d 354). That statute of limitations is found in California Code of Civil Procedure Section 340.6(a) which provides:

> **"An action against an attorney for a wrongful act or omission . . . shall be commenced within one year after the plaintiff discovers, or through the use of reasonable diligence should have discovered, the facts constituting the wrongful act or omission, or four years from the date of the wrongful act or omission, whichever occurs first."** (Cal. Civ. Pro. Code § 340.6(a) (emphasis added)).

Thus, if MOSS ever had any claims against GARRITY for any conduct arising out of the attorney-client relationship, except for actual fraud, she must have brought them within one year of the date she discovered the facts constituting the wrongful act or omission.

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Here, the professional misconduct with which GARRITY is charged arises from failure to assert defenses and legal theories in connection with her representation of MOSS in the Fee Claim. MOSS admits that GARRITY substituted out of that case in October, 1992.[13] MOSS must have been aware that GARRITY had not asserted the defenses and theories which are articulated in MOSS' Complaint during GARRITY's representation of her or, at the very latest, after GARRITY substituted out.

Nevertheless, MOSS asserts, without support or explanation, that she did not discover the purported errors and omissions articulated in her Complaint until March 25, 1996. [See Petition p. 15]. It is apparent that what MOSS means is that she did not concoct her theory until that date, not that she did not know the facts on which she bases her claims. It is well established, however, that the statute begins to run upon the discovery of the facts essential to show the elements of the cause of action, not when the plaintiff discovers a legal theory or remedy based on those facts. (See e.g., McGee v. Weinberg (1979) 97 Cal.App.3d 798, 802-803, 86, 89, 159 Cal.Rptr. 86; Laird v. Blacker (1992) 2 Cal.4th 606, 7 Cal.Rptr.2d 550). MOSS' attempt to now discount the trial court's analysis by asserting her own facts for analysis cannot correct or substitute in for the trial court's sound decision that was affirmed on appeal.

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[13] See Exhibit 3 to Petition, p. 5.

Furthermore, review by this Court would entail review of the factual findings of the lower court, a disfavored ground for review. Thus, since MOSS has alleged no facts which she did not discover, and could not reasonably have discovered within a year of the filing of her Complaint, the statute of limitations with regard to any alleged claims MOSS had against GARRITY expired no later than October, 1993.

III.

CONCLUSION

For each of the foregoing reasons, review of this matter should be denied, just as it was denied by the California Supreme Court. Further, as demonstrated by the analyses set forth in GARRITY's Respondents' Brief, and in the Court of Appeal's decision, the trial court's ruling was absolutely correct, and MOSS' challenges to it must finally come to an end.

Dated: May 21 1998

Respectfully submitted,

By _____
JONATHAN B. COLE
Attorneys for Respondents PEGGY GARRITY, an individual and PEGGY GARRITY, A Professional Corporation